

REMARKS

Provisional election is hereby made, with traverse, to prosecute the invention of Group I, comprising claims 7-10, 24-28, 30, 33-40 as enumerated by the Examiner, and also claim 23, as amended.

The restriction requirement is respectfully traversed. The Official Action has not established a prima facie justification for the requirement for election. The Official Action states: "In the instant case, the combination as claimed does not require the particulars of the subcombination as claimed because **[the subcombination requires two sets of the light emitters and light detectors not required by the combination]**. The subcombination has separate utility such as **[the optical probe arrangement, comprising light emitter, does require the particulars of the combination]**."

In requiring restriction, the Examiner notes the subcombination requires two sets of light emitters and light detectors not required by the combination. While this may be so, it is submitted it would not be a burden to search as alleged by the Examiner. Moreover, contrary to the Examiner's position, the combination and subcombination are both used for optically measuring blood.

In requiring restriction, the Examiner notes the inventions are classified in different classes and sub-classes, thus alluding to the fact that the inventions would involve divergent fields of search. However, as the Examiner is well aware, such a factor per se is not a basis for determining distinctiveness in accordance with MPEP 806.

Furthermore, it is respectfully submitted that there is nothing in 35 USC § 121 that gives the Patent Office the authority to require restriction between different statutory classes of claims unless the claims cover "independent and distinct inventions." It is respectfully

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submitted that the statutory requirements, not having been met here vis-à-vis Groups I and II respectively, the Examiner should withdraw the requirement for restriction and provide Applicants with an action on the merits of the withdrawn claims.

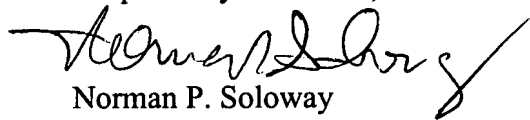
It should be noted that the restriction requirements as prescribed by 35 USC § 121 are discretionary with the Examiner, and in view of the remarks above, the restriction requirement should be withdrawn.

In summary therefore, all of the claims are believed to be directed to a single invention. However, so as to be fully responsive, Applicants provisionally elects to prosecute Group I, i.e. claims 7-10, 24-28, 30, 33-40 as enumerated by the Examiner, and also claim 23, as amended, and it is requested that, without further action thereon, the remaining claims be retained in this application pending disposition of the application, and for possible filing of a divisional application.

An action on the merits is respectfully requested.

In the event there are any fee deficiencies or additional fees are payable, please charge them (or credit any overpayment) to our Deposit Account Number 08-1391.

Respectfully submitted,



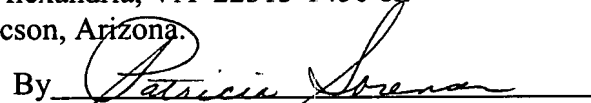
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